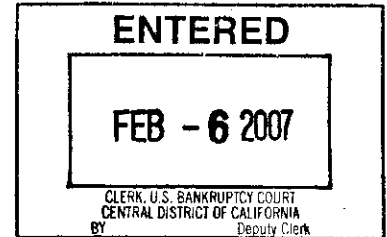
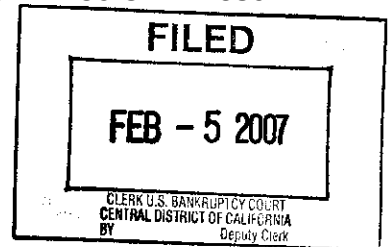


FOR PUBLICATION



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re
FLASHCOM, INC.,
Debtor.

CAROLYN A. DYE, Liquidating
Trustee,
Plaintiff,
vs.

ANDRA SACHS; COMMUNICATIONS
VENTURES III, LP; COMMUNICATIONS
VENTURES III CEO & ENTREPRENEURS'
FUNDS LP; MAYFIELD IX; MAYFIELD
ASSOCIATES FUNDS IV; DAVID HELFICH;
TODD BROOKS; BRADFORD SACHS;
RICHARD RASMUS; and KEVIN FONG,
Defendants.

Case No. SA 00-19215 JR
Adv. No. SA 02-01620 JR
Chapter 11

MEMORANDUM OPINION

Date: December 11, 2006
Time: 2:00 P.M.
Place: Courtroom 5A

I. INTRODUCTION

On July 22, 2002, Carolyn Dye ("Movant") filed an amended
complaint against the defendants (collectively, "Defendants"), in
part, to avoid and recover the debtor's transfer of \$9 million to
Andra Sachs ("Andra") on February 23, 2000 (the "Transfer") under

1 11 U.S.C. §§ 547(b) and 550.¹ Thereafter, Movant and Andra
2 reached a settlement. In furtherance of the settlement, Andra
3 consented to the entry of a judgment avoiding the Transfer under
4 § 547(b) as a preferential transfer.

5 On August 25, 2006, Movant filed a motion (the "Motion") for
6 partial summary judgment, citing § 550, to recover \$9 million
7 from Communications Ventures III, LP, Communications Ventures III
8 CEO & Entrepreneurs' Funds, LP, Mayfield IX, and Mayfield
9 Associates Funds IV (collectively, "Respondents") as entities for
10 whose benefit the Transfer was made. Respondents opposed.
11 Following a hearing on December 11, 2006, I took the matter
12 under submission to determine whether the entry of the stipulated
13 judgment precludes Respondents from defending the avoidability of
14 the Transfer.

15 **II. JURISDICTION**

16 I have jurisdiction over this matter under 28 U.S.C.
17 § 157(b)(1). This is a core proceeding under 28 U.S.C. §§ 157
18 (b)(2)(A), (F), (O).

19 **III. STATEMENT OF FACTS**

20 Andra and her husband, Brad Sachs ("Brad"), founded
21 Flashcom, Inc. ("Debtor"), a telecom startup, during the late
22 1990s. In June 1999, Respondents invested approximately
23

24 ¹ Unless otherwise indicated, all chapter, section, and rule
25 references are to the Bankruptcy Code (the "Code"), 11 U.S.C.
26 §§ 101-1330, prior to its amendment by the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005 (the "Act"), Pub.
28 L. 109-8, 119 Stat. 23, because this case was filed before the
Act's effective date (October 17, 2005), and to the Federal Rules
of Bankruptcy Procedure (the "Rules"), Rules 1001-9036.

1 \$15 million for Debtor's Series A preferred shares. As a result,
2 David Helfich, Todd Brooks, and Kevin Fong (collectively, the
3 "Directors"), alleged principals of Respondents, were appointed
4 to Debtor's board of directors.

5 Concerned with Andra's continued involvement in Debtor,
6 Respondents entered into discussions with Andra for her removal.
7 This resulted in a Loan and Pledge Agreement (the "Loan
8 Agreement"), dated September 3, 1999, whereby Respondents loaned
9 Andra \$1 million (the "Loan") and agreed to loan Andra an
10 additional \$9 million upon Debtor obtaining at least \$30 million
11 in Series B financing. The Loan was evidenced by four non-
12 recourse promissory notes (the "Notes"), and secured by Andra's
13 interest in 500,000 shares of Debtor's common stock. Respondents
14 and Andra also executed a series of four "Purchase Option"
15 agreements and four "Put Option" agreements (collectively, the
16 "Options"). In effect, the Options provided for the transfer of
17 \$1 million worth of Andra's shares to Respondents in satisfaction
18 of the Loan upon Debtor obtaining the above financing.²

19 On February 8, 2000, Debtor, Respondents, and Andra
20 restructured the arrangement contemplated by the Loan Agreement
21 and the Options. Respondents and Andra executed an amendment to
22 the Loan Agreement (the "Amendment"), terminating the parties'
23 obligations under the Options. Also, Debtor, Respondents, and

24
25 ² Specifically, pursuant to the Purchase Options,
26 Respondents had the right to purchase that number of shares equal
27 to the amount of the Notes at 85% of the per share price. The
28 Put Options, on the other hand, provided that Andra had the right
to sell or put her shares to Respondents. Under both the
Purchase Options and the Put Options, Respondents had the right
to obtain the shares by applying the amounts due on the Notes.

1 Andra executed a Stock Purchase Agreement (the "Stock Purchase
2 Agreement"), reinstating Respondents obligation to purchase
3 \$1 million worth of Andra's shares of Debtor's common stock, and
4 requiring Debtor to redeem \$9 million worth of Andra's shares at
5 85% of the per share price.

6 Eight days later, Debtor and the Series B investors executed
7 a Series B Preferred Stock Purchase Agreement (the "Series B
8 Agreement"), providing for the purchase of \$84 million of
9 Debtor's Series B preferred stock at \$6.57 per share. In
10 addition, the Series B Agreement provided that \$9 million of the
11 proceeds were to be used to redeem Andra's stock. On February
12 23, 2000, Debtor paid Andra \$9 million to redeem 1,611,604 shares
13 at a redemption price of \$5.58 per share.

14 On December 8, 2000, Debtor filed a voluntary chapter 11
15 petition. Thereafter, Debtor filed a plan of reorganization that
16 was confirmed on December 11, 2001. Debtor's plan designated
17 Movant as the liquidating trustee for Debtor's estate.

18 On July 11, 2002, Movant commenced this adversary proceeding
19 (the "Stock Redemption Proceeding") against Defendants. On July
20 22, 2002, Movant filed an amended complaint (the "Complaint").
21 In the Complaint, Movant alleged that Defendants either
22 orchestrated or participated in certain unauthorized, improper,
23 or otherwise avoidable agreements and transfers with Debtor
24 between September 1999 and February 2000. Specifically, Movant
25 asserted that the Transfer was avoidable as a preferential
26 transfer to or for the benefit of Andra, and recoverable from
27 Andra, as the initial transferee, or Respondents and the
28 Directors, as entities for whose benefit the Transfer was made.

1 On September 2, 2005, Movant, Andra, and others reached a
2 global settlement (the "Global Settlement Agreement"). The
3 Global Settlement Agreement was designed to resolve the Stock
4 Redemption Proceeding as to Andra.³ By order entered November 1,
5 2005, I approved the Global Settlement Agreement. On August 8,
6 2006, a judgment (the "Stipulated Judgment") was entered,
7 providing that: "(a) [t]he wire transfer by Flashcom, Inc. of \$9
8 million made on February 23, 2000 to Memory Max, dba a Taste of
9 Napa, which was made for the benefit of Andra Sachs, is avoided
10 as a preferential transfer pursuant to 11 U.S.C. § 547(b)."

11 On August 25, 2006, Movant moved for partial summary
12 judgment that, pursuant to § 550, she may recover \$9 million from
13 Respondents. Movant argued that entry of the Stipulated Judgment
14 avoided the Transfer to the extent of \$9 million, and therefore,
15 she is entitled to recover \$9 million from Respondents as
16 entities for whose benefit the Transfer was made. Respondents
17 opposed the Motion, arguing that they have the right to litigate
18 the avoidability of the Transfer as a preference, and that they
19 were not the beneficiaries of the Transfer. Following a hearing
20 on December 11, 2006, I took the matter under submission to
21

22 ³ In pertinent part, the Global Settlement Agreement
23 provided that Andra, without admitting liability and in
24 furtherance of the Global Settlement Agreement, shall agree to
25 the entry of a judgment in the amount of \$9 million under
26 § 547(b) in favor of Movant, and "Andra shall sign a second
27 stipulated judgment pursuant to § 550(a) for recovery against
28 Andra on the [Movant] Avoidance Judgment, which will be entered
if Andra defaults upon her obligation to pay Movant \$50,000 or
\$62,000 depending upon the amount recovered by Movant from
[Respondents and the Directors] in the Stock Redemption
Proceeding."

determine: (A) whether the entry of the Stipulated Judgment precludes Respondents from defending the avoidability of the Transfer under § 547(b); and (B) whether Respondents are entities for whose benefit the Transfer was made.

IV. DISCUSSION

A. Entry of the Stipulated Judgment cannot Deprive the Respondents of Their Right to Defend the §§ 547 and 550 Claims Asserted against Them.

Section 547(b) of the Code permits a bankruptcy trustee to avoid certain preferential pre-petition transfers of interests in property of the debtor. Section 550 provides in relevant part that:

[T]o the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a)(1)-(2). Put simply, § 547(b) specifies a type of transfer that may be avoided by a bankruptcy trustee. See Crafts Plus+, Inc. v. Foothill Capital Corp. (In re Crafts Plus+), 220 B.R. 331, 334 (Bankr. W.D. Tex. 1998). Separately, § 550 identifies the parties against whom a trustee may recover the avoided transfer for the benefit of the estate. Id.

Movant argues that the entry of the Stipulated Judgment avoided the Transfer to the extent of \$9 million. For that reason, Movant argues that she is no longer required to establish the avoidability of the Transfer but may proceed to recover the

1 value of the Transfer from Respondents under § 550(a), provided
2 that she can show that they were entities for whose benefit the
3 Transfer was made. Respondents reply that they are not bound by
4 the Stipulated Judgment, and more importantly, that they have the
5 right to litigate the avoidability of the Transfer.

6 This appears to be a matter of first impression in the Ninth
7 Circuit. Movant has not provided any direct authority for her
8 position.⁴ However, Movant asserts that a plain reading of
9 §§ 547(b) and 550(a), and the separation between the concepts of
10 avoidance and recovery compel summary judgment in her favor.⁵

11 As with any statutory construction dispute, I must begin
12

13 ⁴ Movant relies heavily on Danning v. Miller (In re Bullion
14 Reserve of North America), 922 F.2d 544 (9th Cir. 1991), to
15 support her position. In Danning, the trustee entered into an
16 agreement with the initial transferee stipulating to the
17 avoidability of the initial transfer under § 548. Id. at 546.
18 The trustee then filed suit against the immediate transferee to
19 recover the fraudulent transfer. Id. at 546. Movant finds
20 Danning persuasive because the trustee established the avoidance
21 of a transfer by stipulation with the initial transferee and then
22 sought to recover from a different transferee under § 550(a).
23 However, in Danning, the immediate transferee, subject to the
24 § 550(a) action, conceded that the transfer was avoidable under
25 § 548. Id. at 547. Therefore, the Ninth Circuit was "faced with
26 the narrow issue of whether Miller was a 'transferee' of the \$1.5
27 million within the meaning of section 550(a)(1) or section
28 550(a)(2)." Id. The Ninth Circuit did not address whether the
immediate transferee was precluded from litigating the
avoidability of the transfer, and therefore Danning is of little
help to the present dispute.

⁵ Both the House and Senate Reports accompanying the
Bankruptcy Reform Act of 1978 state that § 550 "enunciates the
separation between the concepts of avoiding a transfer and
recovering from the transferee." H.R. REP. No. 95-595, at 375
(1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6331; S. REP. No. 95-
989, at 90 (1978) reprinted in 1978 U.S.C.C.A.N. 5787, 5876.

1 with language of the statute. Barnhart v. Sigmon Coal Co., Inc.,
2 534 U.S. 438, 450 (2002). "[The] first step in interpreting a
3 statute is to determine whether the language at issue has a plain
4 and unambiguous meaning with regard to the particular dispute in
5 the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117
6 S.Ct. 843, 846 (1997). "[I]f the statutory language is
7 unambiguous and the statutory scheme is coherent and
8 consistent[,] then the court must cease its inquiry, and simply
9 enforce the statute as written. Id. (quoting United States v.
10 Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)) (internal
11 quotation marks omitted); see also Perlman v. Catapult
12 Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165
13 F.3d 747, 754 (9th Cir. 1999). Only in rare cases may a court
14 inquire beyond the plain language of a statute. Ron Pair, 489
15 U.S. at 242; Estate of Cowart v. Nicklos Drilling Co., 505 U.S.
16 469, 475 (1992). "The plainness or ambiguity of statutory
17 language is determined by reference to the language itself, the
18 specific context in which that language is used, and the broader
19 context of the statute as a whole." Robinson, 519 U.S. at 341.

20 The language used in § 550(a) is clear. Once a trustee
21 proves that the elements of an avoidance statute, such as § 547,
22 are satisfied "the unambiguous language of § 550(a) then
23 identifies the party responsible for repayment of the
24 preference." Official Unsecured Creditors Comm. of Sufolla, Inc.
25 v. U.S. Nat'l Bank of Oregon (In re Sufolla), 2 F.3d 977, 980
26 (9th Cir. 1993) (citing Levit v. Ingersoll Rand Fin. Corp. (In re
27 V.N. Deprizio Constr.), 874 F.2d 1186, 1194 (7th Cir. 1989)); see
28 also Kendall v. Sorani (In re Richmond Produce Co., Inc.), 195

1 B.R. 455, 463 (N.D. Cal 1996). The trustee may recover from "the
2 initial transferee . . . or the entity for whose benefit the
3 transfer was made . . . or . . . any immediate or mediate
4 transferee" 11 U.S.C. § 550(a).

5 This conclusion does not end my inquiry. Importantly,
6 neither the Code nor the Rules specify whether a § 550(a)
7 transferee has the right to litigate and/or raise defenses to the
8 avoidablity of a transfer as a preference. See General Motors
9 Acceptance Corp. v. Rodgers (In re Laguna Beach Motors, Inc.),
10 148 B.R. 317, 320 n.4 (9th Cir. BAP 1992) (stating that the Code
11 contains no language limiting who can raise the defenses provided
12 in § 547(c)). Rather, the Code and Rules are silent, and hence
13 ambiguous, leaving the applicable statutory language reasonably
14 susceptible to conflicting interpretations.

15 Where a statute is ambiguous, a court may look beyond the
16 statutory language to the legislative history, and the purpose of
17 the statutory scheme to determine the intent of Congress. United
18 States v. Buckland, 289 F.3d 558, 565 (9th Cir. 2002) (quoting
19 Adams Fruit Co. v. Barrett, 494 U.S. 638, 642 (1990)); United
20 States v. Davidson, 246 F.3d 1240, 1246 (9th Cir. 2001). Here,
21 these tools for determining congressional intent are of little
22 assistance because the congressional record and the legislative
23 history are silent with respect to the issue before the court.

24 However, another well-settled canon of statutory
25 construction is not only helpful, but controlling. "[I]f an
26 otherwise acceptable construction of a statute would raise
27 serious constitutional problems, and where an alternative
28 interpretation of the statute is 'fairly possible,' we are

obligated to construe the statute to avoid such problems.”
I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001) (citation
omitted); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.
and Const. Trades Council, 485 U.S. 568, 575 (1988). Courts do
not have “the unfettered prerogative to rewrite a statute in
order to save it or to ‘ignore the legislative will’ behind it.”
Buckland, 289 F.3d at 564 (quoting Miller v. French, 530 U.S.
327, 341 (2000)). The canon of constitutional doubt permits a
court to avoid constitutional concerns “only where the saving
construction is not plainly contrary to the intent of Congress.”
Miller, 530 U.S. 327, 341 (2000) (quoting Edward J. DeBartolo
Corp., 485 U.S. at 575 (1988)) (internal quotation marks
omitted). Where the intent of Congress is clear, a court must
give effect to that intent. Miller, 530 U.S. at 336.

The Due Process Clause of the Fifth Amendment provides that
“no person shall . . . be deprived of life, liberty, or property,
without due process of law.” U.S. CONST. amend. V. A person’s
right to due process of law is fundamental to our jurisprudence,
Grannis v. Ordean, 234 U.S. 385, 394 (1914), and for more than a
century, the central requisite of due process has been the right
to a meaningful opportunity to be heard. Fuentes v. Shevin, 407
U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223, 233
(1863)). The purpose for providing such due process is clear: to
prevent the mistaken or unfair deprivation of one’s property.
Fuentes, 407 U.S. at 81. Thus, a person has the right to be
heard whenever his life, liberty, or property is at stake in a
judicial proceeding. See Ownbey v. Morgan, 256 U.S. 94, 111
(1921); see also Dusenbery v. U.S., 534 U.S. 161, 167 (2002)

1 (quoting United States v. James Daniel Good Real Property, 510
2 U.S. 43, 48 (1993)).

3 To interpret §§ 547 and 550 Movant's way would raise
4 substantial due process concerns, and would lead to anomalous
5 results. See Thompson v. Jonovich (In re Food & Fibre
6 Protection, Ltd.), 168 B.R. 408, 415-16 (Bankr. D. Ariz. 1994).
7 Movant sued Respondents to avoid and recover the Transfer.⁶ As a
8 result, Movant has clearly put Respondents' property at stake.
9 If Movant prevails, Respondents will be deprived of \$9 million.
10 Moreover, Respondents' ability to defend the \$ 550 claim is of
11 little consolation. The avoidability of the Transfer is a
12 prerequisite to Respondents' potential liability. Once it is
13 determined that a preferential transfer was made, Movant need
14 only show that Respondents received some benefit to hold them
15 strictly liable. See General Elec. Capital Auto Lease, Inc. v.
16 Broach (In re Lucas Dallas, Inc.), 185 B.R. 801, 808 (9th Cir.
17 BAP 1995) (citing Danning, 922 F.2d at 547) (holding that initial
18 transferees are strictly liable for an avoided transfer).

19 Based on the foregoing, I conclude that Respondents have a
20 constitutional right to defend the \$ 547(b) claim asserted
21 against them before they can be deprived of the value of the
22 property transferred under § 550(a). I note that every court to
23 address this issue has, for one reason or another, held that a
24

25 ⁶ Movant emphasizes that the \$ 547 claim was asserted
26 against Andra, only, and not Respondents. However, a review of
27 the Complaint does not support Movant's position. Nowhere in the
28 Complaint does it specify that certain claims are asserted
against Andra or Respondents, only. Rather, the Complaint and
each claim therein were filed against Defendants.

1 stipulated or default judgment entered in an avoidance action
2 does not preclude the defendants in a recovery action from
3 disputing the avoidability of the transfer and raising
4 appropriate defenses. See Thompson, 168 B.R. at 415-16; see also
5 Morris v. Emprise Bank (In re Jones Storage and Moving, Inc.),
6 2005 Bankr. LEXIS 662, *14-16 (Bankr. D. Kan. 2005).

7 Accordingly, it would be inherently unfair and inappropriate for
8 this court to deny Respondents this fundamental right based on a
9 settlement reached by Sachs, a co-defendant, for less than 1% of
10 the requested recovery. Such an outcome would, for obvious
11 reasons, open the door to potential substantial abuse.⁷

12 This interpretation is not contrary to the relevant
13 legislative history, the overall statutory scheme, and Ninth
14 Circuit precedent.⁸ Avoidance and recovery remain conceptually
15 bifurcated as Congress intended. H.R. REP. NO. 95-595; S. REP.
16 NO. 95-989; see also Sufolla, 2 F.3d at 980. Sections 547 and
17 550 remain distinct claims, requiring the litigation of different
18 elements and defenses with different statutes of limitation.⁹

20 ⁷ For example, a potential transferee might stipulate to the
21 avoidance of a transfer in exchange for a trustee's promise to
22 seek recovery from third parties. See Morris, 2005 Bankr. LEXIS
662, *16.

23 ⁸ The Ninth Circuit's decision in Sufolla, upon which Movant
24 relies, does not compel a contrary result. In that case, the
25 Ninth Circuit was not forced to decide the issue currently before
26 the court because, at trial, the defendant was afforded the
opportunity to litigate the avoidability of the transfer and
raise any defenses thereto. See Sufolla, 2 F.3d at 978-79.

27 ⁹ Movant makes much of the fact that § 550(f)(1) provides
28 that a proceeding to recover a transfer must be commenced not
later than the earlier of one year after the avoidance of the

1 Furthermore, avoidability remains an attribute of the transfer.
2 See Sufolla, 2 F.3d at 982 (quoting Deprizio, 874 F.2d at 1195).
3 Movant is not required to prove that the Transfer is avoidable as
4 to Respondents, but that each element of § 547(b) is satisfied.

5 As noted by numerous courts, § 547 addresses transfers, and
6 not creditors or transferees. See Crafts Plus, 220 B.R. at 334.
7 That is, § 547 does not specify the proper defendant for a
8 preference action. Id. Rather, § 550 identifies who the trustee
9 may proceed against. Moreover, avoidance and recovery, while
10 conceptually separate, do not occur in a vacuum. They are
11 intertwined, as both are typically required to make the estate
12 whole. As such, it is reasonable to believe that Congress
13 intended the trustee to avoid and recover a transfer against the
14 same entity, whether it be in one proceeding or two.¹⁰

15 Lastly, Respondents have not waived their fundamental right
16 to due process. Respondents were named defendants to each cause
17 of action in the Complaint. Similarly, Respondents answered
18 without limitation. True, the Global Settlement Agreement was
19 approved after notice and hearing at which Respondents were
20 present. However, neither the court nor Respondents were aware

21
22 transfer, or the time the case is closed or dismissed. However,
23 my interpretation does not render this subsection meaningless
24 because a trustee has a specified time to avoid a transfer and an
25 additional year after avoidance to recover the transfer under
§ 550.

26 ¹⁰ This belief is further supported by § 547(g), which
27 provides that "the creditor or party in interest against whom
28 recovery or avoidance is sought has the burden of proving the
nonavoidability of a transfer" 11 U.S.C. § 547(g)
(emphasis added).

1 of Movant's intent to use the Stipulated Judgment to terminate
2 Respondents' right to litigate the preference claim. In fact,
3 Movant indicated that approval of the Global Settlement Agreement
4 would not affect her claims against Respondents. As such, the
5 hearing on the Global Settlement Agreement did not provide
6 Respondents with a meaningful opportunity to be heard.

7 In sum, to recover the amount of the Transfer from
8 Respondents, Movant must prove the elements of avoidance under
9 § 547(b) by a preponderance of the evidence. Movant has failed
10 to provide any evidence regarding the avoidability of the
11 Transfer. Accordingly, the Motion is denied.

12 ***B. Genuine Issues of Material Fact Exist Whether***
13 ***Respondents are Entities for Whose Benefit the Transfer***
14 ***was made.***

15 As stated above, to the extent a transfer is avoided, the
16 trustee may recover the property transferred, or its value, from
17 "(1) the initial transferee of such transfer or the entity for
18 whose benefit such transfer was made; or (2) any immediate or
19 mediate transferee of such initial transferee."

20 11 U.S.C. § 550(a)(1)-(2). Because Andra is the initial
21 transferee, recovery of the Transfer under § 550 from Respondents
22 is not appropriate unless they constitute an "entity for whose
23 benefit such transfer was made." "Two frequently cited examples
24 of an entity for whose benefit the transfer was made are (1) a
25 guarantor of the debtor and (2) a debtor of the initial transferee."

26 5 L. KING, COLLIER ON BANKRUPTCY ¶ 550.02[4] (15th ed. rev. 2001)
27
28

1 (citing Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d
2 890, 895 (7th Cir. 1988) ("The paradigm 'entity for whose benefit
3 such transfer was made' is a guarantor or debtor - someone who
4 receives the benefit but not the money.")). Importantly, the
5 "entity need not actually benefit, so long as the transfer was
6 made for his benefit." Danning, 922 F.2d at 547.

7
8 Movant argues that Respondents are entities for whose
9 benefit the Transfer was made because Debtor made the Transfer to
10 extinguish Respondents' obligations to Andra. Movant is correct
11 that after execution of the Loan Agreement, Andra had a
12 contingent right to payment from Respondents. Therefore, as
13 contended by Movant, Respondents were debtors of Andra, and
14 potential beneficiaries of the Transfer under § 550. See 11
15 U.S.C. § 101(5)(A), (12). However, Respondents argue that the
16 Amendment and the Stock Redemption Agreement, executed fifteen
17 days prior to the Transfer, terminated Respondents obligation to
18 pay Andra \$9 million, and as a result, Debtor made the Transfer
19 to satisfy its contractual obligation to pay Andra \$9 million, as
20 opposed to benefitting Respondents.
21

22 The Amendment, standing alone, did not terminate
23 Respondents' obligation to loan Andra \$9 million contingent on
24 Debtor obtaining the requisite financing. Rather, the Amendment
25 terminated only the Options, requiring Respondents to purchase
26 \$1 million worth of Andra's stock and requiring Andra to sell the
27
28

1 same in satisfaction of the Loan. Arguably, Respondents'
2 contingent \$9 million loan obligation remained unaffected. The
3 Amendment stated that, except as expressly modified, the terms of
4 the Loan Agreement remained in full force.

5 Debtor was also indebted to Andra. Concurrently with the
6 execution of the Amendment, Debtor, Andra, and Respondents
7 executed the Stock Redemption Agreement. Debtor agreed to redeem
8 \$9 million worth of Andra's shares. Respondents were neither
9 guarantors nor co-obligors of Debtor's obligation to Andra.
10 Moreover, the Stock Redemption Agreement did not cross reference
11 the \$9 million loan, and specifically, did not provide for the
12 release and/or satisfaction of Respondents' loan obligation to
13 Andra upon the Transfer. Therefore, a dispute of fact exists
14 whether Debtor's redemption of Andra's shares was intended to
15 release Respondents' obligation to loan Andra \$9 million.

16 In sum, the parties dispute whether the execution of the
17 Amendment and the Stock Purchase Agreement was intended to
18 extinguish Respondents' obligation to loan Andra \$9 million, and
19 ultimately, purchase \$9 million worth of Andra's stock. Neither
20 agreement provides for the satisfaction of Respondents' loan
21 obligation upon their execution or upon the Transfer. Lastly,
22 while the restructuring of the deal to buy-out Andra enabled
23 Respondents to purchase Series B Preferred shares, as opposed to
24 Andra's common stock, genuine issues of fact exist whether Debtor
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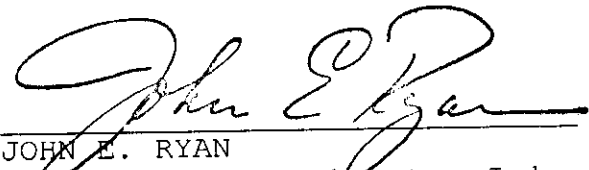
1 was solvent at the time of the Transfer, and therefore, whether
2 Respondents received any real benefit from obtaining preferred
3 shares. Accordingly, genuine issues of fact exist whether the
4 Transfer was made to benefit Respondents, and specifically, to
5 satisfy Respondents' contingent loan obligation to Andra.
6

7 **V. CONCLUSION**

8 The entry of the Stipulated Judgment did not avoid the
9 Transfer. Respondents have a constitutional right to defend the
10 claims asserted against them before they can be deprived of their
11 property. Therefore, to recover the Transfer from Respondents,
12 Movant must prove the elements of § 547. Moreover, genuine
13 issues of material fact remain as to whether Defendants are
14 entities for whose benefit the Transfer was made. Accordingly,
15 the Motion is denied.
16

17 This memorandum decision shall constitute my findings of
18 fact and conclusions of law.

19 Dated: February 5, 2007

20 
21 JOHN E. RYAN
22 United States Bankruptcy Judge
23
24
25
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re)	Case No.	SA 00-19215 JR
)	Adversary No.	SA 02-01620 JR
FLASHCOM, INC. ,)		
)	NOTICE OF ENTRY OF ORDER	
Debtor.)		

To:

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You are hereby notified, pursuant to Bankruptcy Rule 9022 that
a judgment or order entitled MEMORANDUM OPINION and ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was entered on
FEB - 6 2007.

I hereby certify that I mailed a copy of this notice to the
above-named persons on FEB - 6 2007.

Dated: FEB - 6 2007

JON D. CERETTO

By

A. McCall

Deputy Clerk